

REMARKS

Applicants thank the Examiner for the careful consideration of this application. Claims 2-4, 6-11, and 25-28 are currently pending. Claims 2-4, 6, and 8-11 have been amended. Claims 1, 5, and 12-24 have been cancelled, without prejudice. New claims 25-28 have been added. Based on the foregoing amendments and the following remarks, Applicants respectfully request that the Examiner reconsider all outstanding rejections and that they be withdrawn.

Examiner Interview

The Applicants appreciate the courtesy that was extended by Examiner Arthur Corbin to Robert Kennedy, Kelly Kirschner, Ward Goodell, and Steven Schwarz during the personal interview conducted at the U.S. Patent and Trademark Office on February 5, 2008. During the interview, a commercial embodiment of the claimed process of making an ice cream product was demonstrated to Examiner Corbin. In addition, the Applicants proposed two new claims to Examiner Corbin (see the attachment to the Interview Summary form). The claims discussed during the interview are presented herein as new claims 25 and 26, with claim 25 replacing previous independent claim 1, now cancelled. The Applicants provided explanations demonstrating how the proposed new claims distinguish over the Paskach et al. and Inagaki et al. references. The arguments presented during the interview are substantially the same as those provided below. The Examiner agreed that the proposed new claims (corresponding to new claims 25 and 26, herein) distinguish over the Paskach and Inagaki references, as indicated on the Interview Summary form.

Rejections under 35 U.S.C. § 103

The Office Action rejects claims 1-11 under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 6,510,890 to Paskach et al. in view of U.S. Patent No. 5,098,732 to Inagaki et al. Claim 1, the independent claim, has been cancelled and replaced with new independent claim 25. Dependent claim 5 has been cancelled, without prejudice. Dependent claims 2-4 and 6-11 have been amended to depend, either directly or indirectly, from new independent claim 25. The Applicants respectfully submit that new claim 25, and its dependent claims, are patentable over any reasonable combination of Paskach and Inagaki for at least the following reasons.

1. “mechanically mixing . . . in the open top container”

As demonstrated during the personal interview on February 5, 2008, neither Paskach nor Inagaki discloses “mechanically mixing the ingredients with the liquefied gas *in the open top container* to produce the ice cream product” as recited by claim 25 (emphasis added). The Office Action apparently cites to column 4, lines 42-53 of Paskach for disclosure of this claim feature, where Paskach discloses that a premix and refrigerant combine naturally in a mixer 116 to form a frozen food product 124, which is subsequently dispensed into a frozen food product container 114. However, with the Paskach process, the premix is not mixed with the refrigerant “in [an] open top container,” as claimed. Rather, the premix and refrigerant are mixed inside the mixer 116, which has a *closed top* by virtue of the pressurized lines 120, 122 that pump the premix and refrigerant, respectively, to the mixer 116. (See, e.g., Paskach at column 4, lines 38-42; FIG. 1.)

In the Paskach process, after the mixing takes place in the closed top mixer 116, the

frozen food product exits the mixer 116 into the frozen food product container 114, which is essentially a cup or other container from which a consumer can dispense the frozen food product.

Although Paskach discloses that the frozen food product container 114 may have a lid 125 with vent holes 126, or alternatively, may have no lid at all (*see, e.g.*, Paskach at column 4, lines 45-53), nowhere does Paskach disclose that the premix and refrigerant are mixed in the frozen food product container 114 itself. Rather, the premix and refrigerant are mixed in the closed top mixer 116, and the resulting frozen food product is simply dispensed from the mixer 116 into the frozen food product container 114 for consumption.

The attached Exhibit A depicts a commercial embodiment of the Paskach device marketed by Blue Sky® Creamery. The Paskach device is shown in the upper portion of page 1 of Exhibit A. The mixer 116 and lines 120, 122 are shown on page 2 of Exhibit A, where the closed nature of the mixer can clearly be seen. As a result of the closed nature of Paskach's mixer 116, a customer is unable to observe the frozen food product as it is being made. In addition, the closed nature of the mixer 116 prevents solid ingredients, such as frozen fruit or hard candy, from being mixed into the frozen food product as the premix and refrigerant are mixed together. Further, as will be discussed in more detail below, the closed nature of Paskach's mixer 116 prevents a visible amount of cryogenic vapor from being released during the process of making the frozen food product.

Inagaki does not remedy the deficiencies of Paskach. Specifically, Inagaki does not disclose "mechanically mixing the ingredients with the liquefied gas *in the open top container*," as recited by claim 25 (emphasis added). Instead, with the Inagaki process, ice-cream is made by

mixing the material bulk of ice-cream with liquid nitrogen in a *sealed* environment. More specifically, the material bulk and liquid nitrogen are mixed in a sealed enclosure formed by a cooling container 3 and semicircular closures 25, 25', which are themselves sealed in a housing 14. (See, e.g., Inagaki at column 3, lines 62-65 and 34-41; FIGS. 2, 5.) As a result of the sealed environment of Inagaki, a customer is unable to observe the ice-cream as it is being made; solid ingredients cannot be mixed into ice-cream as it is being made, and a visible amount of cryogenic vapor cannot be released during the ice-cream making process. Accordingly, Inagaki does not remedy the deficiencies of Paskach. Therefore, no reasonable combination of Paskach and Inagaki discloses "mechanically mixing the ingredients with the liquefied gas in the open top container to produce the ice cream product" as recited by claim 25.

2. "a visible amount of cryogenic vapor flowing from the open top of the container"

As demonstrated during the personal interview on February 5, 2008, neither Paskach nor Inagaki discloses that "a sufficient amount of the liquefied gas is introduced into the container to produce a visible amount of cryogenic vapor flowing from the open top of the container [in which the ingredients are mechanically mixed]" as recited by claim 25. As demonstrated above, both Paskach and Inagaki mix their ingredients in containers that have a closed top. Specifically, Paskach mixes its premix and refrigerant in an enclosed mixer 116; and Inagaki mixes its material bulk and liquid nitrogen in a cooling container 3 that is sealed by semicircular closures 25, 25', and the container 3 is in turn sealed in a housing 14. As a result of the closed nature of both Paskach and Inagaki, neither of them can "produce a visible amount of cryogenic vapor flowing from the open top of the container [in which the ingredients are mechanically mixed],"

as claimed. Furthermore, although Paskach discloses that frozen food product container 114 can have a lid 125 with vent holes 126, or alternatively, can have no lid at all (*see* Paskach at column 4, lines 45-53), Paskach does not *mix* the premix and refrigerant in container 114, but rather, simply dispenses the finished frozen food product 124 into the container 114. For the foregoing reasons, no reasonable combination of Paskach and Inagaki discloses that “a sufficient amount of the liquefied gas is introduced into the container to produce a visible amount of cryogenic vapor flowing from the open top of the container [in which the ingredients are mechanically mixed]” as recited by claim 25.

3. Teaching Away

Although not specifically discussed during the personal interview on February 5, 2008, the Applicants respectfully submit that Paskach expressly teaches away from “*mechanically* mixing the ingredients with the liquefied gas in the open top container” as recited by claim 25 (emphasis added). The Office Action acknowledges that Paskach fails to disclose mechanical mixing, however, it asserts that it would have been obvious to use mechanical mixing means in Paskach to assist in the mixing, in view of Inagaki. The Applicants respectfully submit that the asserted combination of Paskach and Inagaki is improper for the following reasons.

It is improper to combine references where the references teach away from their combination. (*In re Grasselli*, 713 F.2d 731, 743 (Fed. Cir. 1983); M.P.E.P. § 2145(X)(D)(2).) Paskach expressly teaches away from the use of mechanical mixing means. For example, Paskach states in the Summary section that “[a]n apparatus for making a frozen food product comprising a mixer *having no moving parts* is disclosed.” (Paskach at column 1, lines 53-55

(emphasis added).) Paskach states further that “mechanical mixing means are often complex in nature and subject to wear and/or breakage.” (*Id.* at column 1, lines 25-35.) Still further,

Paskach states that “[t]he mixer 116 can be any suitable size and shape that allows the premix and refrigerant to combine naturally . . . ***rather than with mechanical mixing means***, such as paddles, augers, scrapers, and so forth.” (*Id.* at column 5, lines 37-42 (emphasis added).)

Paskach further teaches away from mechanical mixing at column 1, lines 61-62, column 4, lines 42-44, and column 6, lines 20-25. Therefore, it would not have been obvious to incorporate the mechanical mixing means of Inagaki (*i.e.*, cooling whirl 4 or agitation wheel 42) into the Paskach process. Accordingly, the Applicants respectfully submit that the combination of Paskach and Inagaki asserted by the Office Action is improper.

The Applicants respectfully submit that independent claim 25 is patentable over Paskach and Inagaki for at least the foregoing reasons. Claims 2-4 and 6-11 depend variously from claim 25, and are patentable for at least the same reasons.

Conclusion

All of the stated grounds of rejection have been properly traversed, accommodated, or rendered moot. Applicants, therefore, respectfully request that the Examiner reconsider all presently outstanding rejections and that they be withdrawn. Applicants believe that a full and complete reply has been made to the outstanding Office Action and, as such, the present application is in condition for allowance. If the Examiner believes, for any reason, that personal

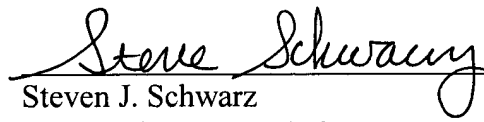
Applicant: Robert Kennedy et al.
Appl. No.: 10/725,000

communication will expedite prosecution of this application, the Examiner is hereby invited to telephone the undersigned at the number provided.

Prompt and favorable consideration of this Amendment is respectfully requested.

Respectfully submitted,

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Steven J. Schwarz
Registration No. 47,070
VENABLE LLP
P.O. Box 34385
Washington, DC 20043-9998
Telephone: (202) 344-4000
Direct Dial: (202) 344-4295
Telefax: (202) 344-8300

Enclosures: Exhibit A (two pages)

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EXHIBIT A
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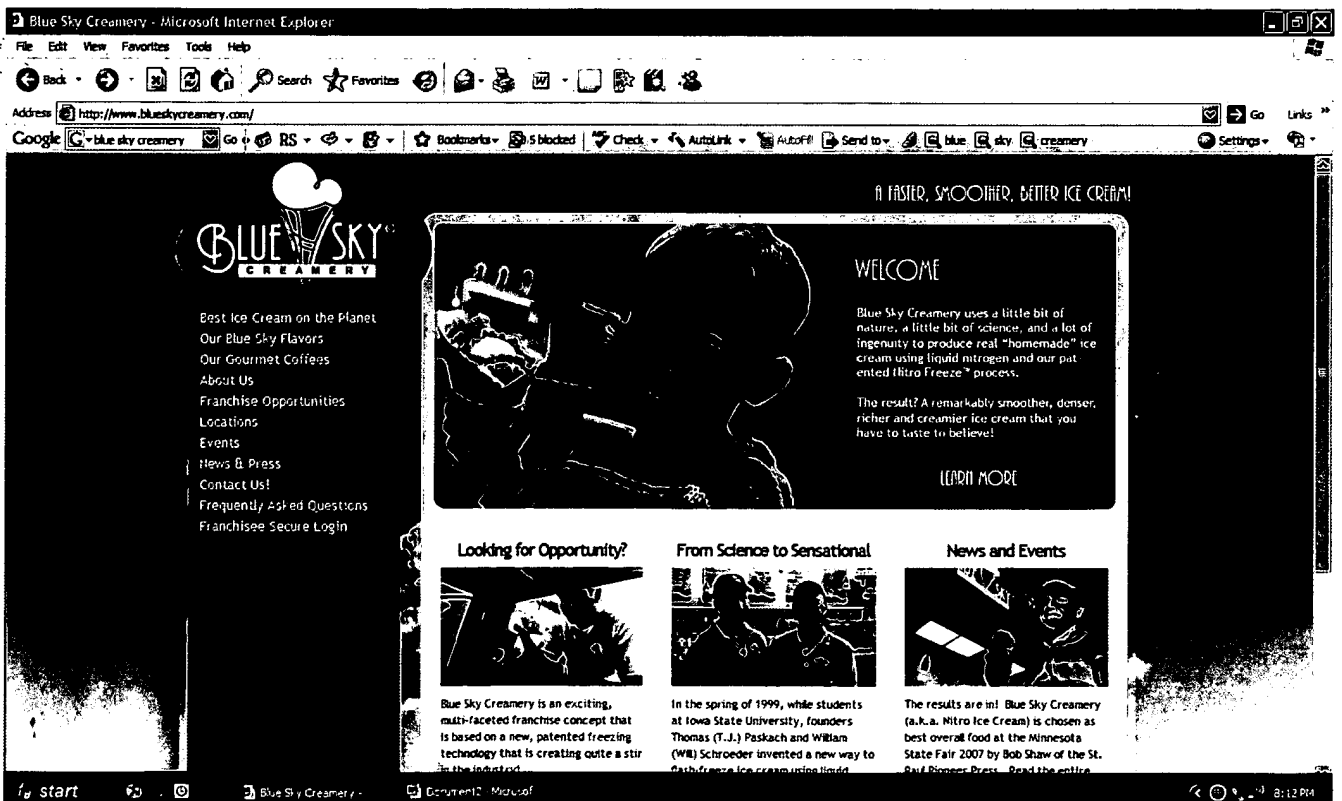
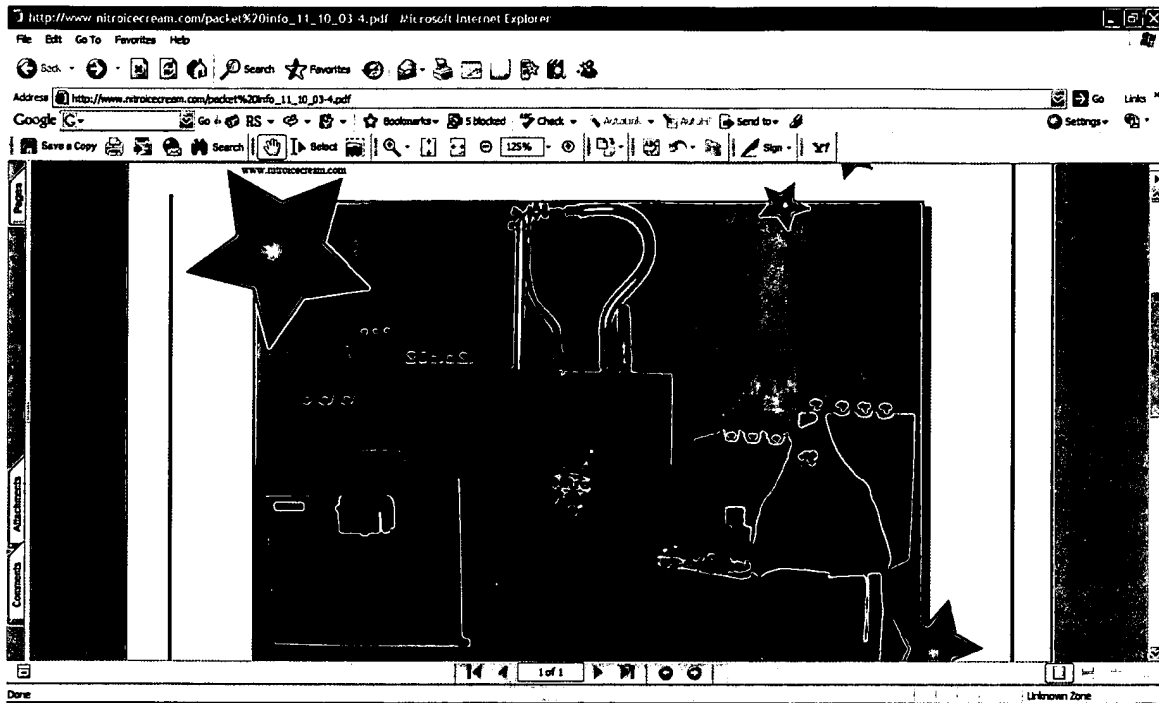


EXHIBIT A
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